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8 JANE DOE and JOHN DOE, individually and
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10
11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13 **SOUTHERN DIVISION**

14 JANE DOE and JOHN DOE, individually
15 and on behalf of others similarly situated,

16 Plaintiffs,

17 v.

18 DONALD J. TRUMP, in his individual
19 and official capacity as President of the
20 United States; MITCH MCCONNELL, in
21 his individual and official capacity as a
22 Senator and Sponsor of S. 3548 CARES
23 Act; and STEVEN MNUCHIN, in his
24 individual and official capacity as the
25 Acting Secretary of the U.S. Department
26 of Treasury; CHARLES RETTIG, in his
27 individual and official capacity as U.S.
28 Commissioner of Internal Revenue; U.S.
DEPARTMENT OF THE TREASURY;
the U.S. INTERNAL REVENUE
SERVICE; and the UNITED STATES OF
AMERICA,

Defendants.

CASE NO: 8:20-cv-00858-SVW-JEM
Assigned to the Hon. Stephen V. Wilson

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS**

Hearing Date: July 13, 2020
Time: 1:30 p.m.
Courtroom: 10A
Location: 350 W. 1st Street
Los Angeles, CA
90012

Action Filed: May 6, 2020

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PROCEDURAL HISTORY

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2 On May 6, 2020, Plaintiff Jane Doe, individually and on behalf of others
3 similarly situated, filed a class action complaint challenging the Coronavirus Aid,
4 Economic Relief, and Security Act (the “CARES Act” or “Act”) and alleging
5 violations of her constitutional rights. *See* Dkt. 1. Plaintiff subsequently filed her
6 Emergency Motion seeking emergency declaratory and injunctive relief. (“Em.
7 Mot.”). *See* Dkts. 9 & 11. Defendants objected to the granting of Plaintiff’s
8 Emergency Motion (*see* Dkts. 22, 23), and Plaintiff filed her Reply in Support of her
9 Motion on June 2, 2020 (“TRO Reply”). *See* Dkt. 26. The next day, Plaintiffs Jane
10 Doe and John Doe filed their First Amended Complaint (“FAC”). *See* Dkt. 28. On
11 June 15, 2020 Defendants filed a Motion to Dismiss (“MTD”) based on lack of
12 jurisdiction, a motion which pays lip service to the allegations included in the FAC
13 but completely ignores the basis for jurisdiction addressed in the TRO Reply. *See*
14 Dkt. 30. Plaintiffs incorporate by reference their Em. Mot. and TRO Reply herein.

INTRODUCTION

16 The outbreak of COVID-19, also known as Coronavirus, wreaked
17 unprecedented havoc on the United States and its economy (the “Pandemic”).
18 Michael R. Sisak et al., *‘We Need Help’: Economic, health crises grow as cases top*
19 *IM*, ASSOCIATED PRESS (April 2, 2020), [https://apnews.com/](https://apnews.com/7c8c65a74daaf0ada3582d3b3161b35f)
20 [7c8c65a74daaf0ada3582d3b3161b35f](https://apnews.com/7c8c65a74daaf0ada3582d3b3161b35f) (last visited June 20, 2020). Leading up to the
21 CARES Act passage, extraordinary numbers of Americans lost their jobs. *Id.* Schools
22 across the country were cancelled. Cory Turner, *Half of U.S. Public School Students*
23 *are Home for the School Year*, NPR (April 16, 2020), [https://www.npr.org/sections/](https://www.npr.org/sections/coronavirus-live-updates/2020/04/16/835941050/nearly-half-of-u-s-public-school-students-are-home-for-the-school-year)
24 [coronavirus-live-updates/2020/04/16/835941050/nearly-half-of-u-s-public-school-](https://www.npr.org/sections/coronavirus-live-updates/2020/04/16/835941050/nearly-half-of-u-s-public-school-students-are-home-for-the-school-year)
25 [students-are-home-for-the-school-year](https://www.npr.org/sections/coronavirus-live-updates/2020/04/16/835941050/nearly-half-of-u-s-public-school-students-are-home-for-the-school-year) (last visited June 22, 2020). Courts closed first
26 to persons who travelled to certain countries outside the United States, and then
27

1 closed entirely except for hearings on criminal duty matters. *See* C.D. Cal. General
2 Order No. 20-03, March 13, 2020; Order of the Chief Judge No. 20-042, March 19,
3 2020; and General Order No. 20-05, April 13, 2020. The Pandemic inflicted unheard
4 of economic ramifications, and Congress responded in an unprecedented way,
5 enacting the largest economic stimulus package in United States history. Jordan
6 Fabian and Justin Sink, *Trump Signs \$2 Trillion Virus Bill, Largest Ever U.S.*
7 *Stimulus*, BLOOMBERG (March 27, 2020), [https://www.bloomberg.com/news/articles/
8 2020-03-27/trump-signs-2-trillion-virus-bill-largest-ever-u-s-stimulus](https://www.bloomberg.com/news/articles/2020-03-27/trump-signs-2-trillion-virus-bill-largest-ever-u-s-stimulus) (last visited
9 June 19, 2020). On March 25 and 26, 2020, Congress passed the CARES Act.
10 CARES Act, Pub. L. No. 116-136, March 27, 2020, 134 Stat 281. The next day,
11 President Donald J. Trump signed the CARES Act into law. *Id.*

12 Congress provided for immediate distribution of funds to combat multiple
13 issues – not just record unemployment, but also record job elimination. *Id.* The
14 Pandemic caused sharp declines in retail sales and in individuals’ abilities to pay
15 housing and food expenses. Heather Long and Renae Merle, *Many Americans’*
16 *Biggest Worry Right Now is April 1 Rent and Mortgage Payments*, WASHINGTON
17 POST (March 22, 2020) [https://www.washingtonpost.com/business/2020/03/22/april-
19 rent-due-coronavirus/](https://www.washingtonpost.com/business/2020/03/22/april-
18 rent-due-coronavirus/) (last visited June 19, 2020). The CARES Act pushed
20 emergency funds into the hands of desperate Americans, so that they could pay
21 necessary living expenses – right away.¹ The record-breaking relief measure helped
22 to prevent unprecedented evictions, foreclosures, health care emergencies, and
23 starvation threatening hundreds of millions of Americans. Long, *supra*. Microsoft co-
24 founder Bill Gates said: “***It is impossible to overstate the pain people are feeling***

25 ¹ According to the Internal Revenue Service, necessary living expenses include food
26 & clothing, housing and utilities, healthcare, and transportation. *Collection Financial*
27 *Standards*, IRS.GOV (March 30, 2020) [https://www.irs.gov/businesses/small-
28 businesses-self-employed/collection-financial-standards](https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards) (last visited June 19, 2020).

1 *now and will feel for years to come.*” Sandi Doughton, ‘*It is Impossible to Overstate*
2 *the Pain*’: *Fight Against Coronavirus Will Define Our Era, Bill Gates Says*, THE
3 SEATTLE TIMES (April 23, 2020), [https://www.seattletimes.com/nation-world/it-is-](https://www.seattletimes.com/nation-world/it-is-impossible-to-overstate-the-pain-fight-against-coronavirus-will-define-our-era-bill-gates-says/)
4 [impossible-to-overstate-the-pain-fight-against-coronavirus-will-define-our-era-bill-](https://www.seattletimes.com/nation-world/it-is-impossible-to-overstate-the-pain-fight-against-coronavirus-will-define-our-era-bill-gates-says/)
5 [gates-says/](https://www.seattletimes.com/nation-world/it-is-impossible-to-overstate-the-pain-fight-against-coronavirus-will-define-our-era-bill-gates-says/) (last visited June 19, 2020) (emphasis added).

6 The CARES Act sought to ease this pain for individuals and jump-start the
7 economy by creating a refundable tax credit for any eligible individual who holds a
8 social security number (“SSN”) by adding 26 U.S.C. § 6428 to the Internal Revenue
9 Code. S. 3548, 116th Cong. (2020) (“Section 6428”). Section 6248 provides for an
10 Economic Impact Payment to be made in the form of an Advance Payment to all
11 individuals who are eligible to receive the credit on or before December 31, 2020 (the
12 “Advance Payment”). Congress mandated the Advance Payments to be made “as
13 rapidly as possible,” and directed the Secretary of the Treasury to conduct a public
14 awareness campaign regarding “information about availability of the credit and
15 rebate.” CARES Act, § 2201(e). While Section 6428(e) requires a “truing up” of the
16 Advance Payment with an individual’s income tax return based on the actual amount
17 of the 2020 credit permitted (computed based on 2020 filing status and liability), if an
18 eligible individual receives an overpayment *it is not required to be repaid*. I.R.C.
19 § 6428(e). In other words, the Advance Payment is a benefit conferred to United
20 States citizens who meet certain income eligibility requirements, and they may retain
21 it even if it later turns out they were not eligible. *Id.*

22 Recognizing the dire circumstances faced by many families and the threat to
23 our national economy, Congress directed that any Advance Payment **must be paid**
24 *before* December 31, 2020, or not at all, because Congress expressly forbid the
25 Commissioner of Internal Revenue from issuing any Advance Payment later: “[n]o
26 refund or credit shall be made or allowed under this subsection after December 31,
27

1 2020.” I.R.C. § 6428(f)(3)(A).

2 However, under the exclusion provision found in § 6428(g)(1)(B) (the
3 “Exclusion Provision”), Plaintiffs and the Putative Class are not eligible for Advance
4 Payments under the Act because they filed taxes jointly with their spouses, who do
5 not hold SSNs. I.R.C. § 6428(g). American citizens who are married to other
6 American citizens and met the income eligibility requirements in 2019 will receive
7 the Advance Payment even if it turns out that their income in 2020 exceeds the
8 statutory income ceilings. The same is true of unmarried American citizens, as well
9 as American citizens married to non-citizens who have a social security number.
10 Only Plaintiffs and the Putative Class – American citizens married to individuals who
11 do not have an SSN who file joint income tax returns but otherwise meet all
12 eligibility requirements – are excluded from receiving the Advance Payment based
13 solely on whom they married.

14 Depriving U.S. citizens of an emergency benefit that has been distributed to
15 over one hundred million Americans (and counting), does not need to be repaid by
16 other Americans who are later determined to be ineligible to receive it, and – by its
17 own terms – must be issued on or before December 31, 2020, or not at all, based
18 purely on whom those chose to marry violates the United States Constitution. *See*
19 Treasury, IRS release latest state-by-state Economic Impact Payment figures for May
20 22, 2020 IR-2020-101, May 22, 2020, attached hereto and incorporated herein as
21 Exhibit A. Plaintiffs could request the credit (thereby risking potential criminal
22 liability), file an administrative claim for refund, and litigate the propriety of the
23 Exclusion Provision in the years to come. But doing so would not and could not
24 afford them equal treatment under the law as compared to their fellow American
25 citizens: eligibility to receive an Advance Payment, before December 31 of this year,
26 that does not require repayment regardless of later eligibility determinations.

1 Defendants take the same incorrect legal position in the MTD as they did in
 2 their Opposition to the TRO motion. *See* Dkt. 23. Defendants argue, and Plaintiffs
 3 agree, that *in the tax context*, there are limited circumstances under which suit can be
 4 brought against the government. *See* Dkt. 30 at 6. If the Advance Payment were a tax,
 5 Plaintiffs would be in jurisdictional trouble. But just as pointed out by Defendants,
 6 the Advance Payment isn't a tax, it is a refundable tax credit. *See id.* at 7. Because
 7 Plaintiffs' claim relates to a refundable tax credit, and not a tax, jurisdiction is
 8 unequivocally established here.

9 ARGUMENT

10 I. Sovereign Immunity is Waived by the APA Regardless of Whether a 11 Claim "Arises Under" the APA

12 Plaintiffs' claims arise under the Constitution of the United States, and
 13 accordingly 28 U.S.C. § 1331 ("Section 1331") confers jurisdiction to this Court.
 14 Section 1331 provides "district courts shall have original jurisdiction of all civil
 15 actions arising under the Constitution, laws [...] of the United States." 28 U.S.C.
 16 § 1331. Section 1367 similarly allows jurisdiction over any supplemental claims "that
 17 are so related to claims in the action within [the court's] original jurisdiction that they
 18 form a part of the same case or controversy." 28 U.S.C. § 1367(a).

19 The Supreme Court's newly-issued decision in *Department of Homeland*
 20 *Security et al. v. Regents of the University of California Wolf v. Vidal*, No. 18-587,
 21 2020 WL 3271746 (U.S. June 18, 2020) ("*Regents*") eliminates any doubt that this
 22 Court has jurisdiction over Plaintiffs' claims. In *Regents*, an immigration relief
 23 program known as Deferred Action for Childhood Arrivals ("DACA") provided a
 24 means for certain individuals who are not citizens or legal permanent residents to
 25 remain in the United States. *Id.* at *3. The Department of Homeland Security
 26 ("DHS") rescinded the program, and the Department's Acting Secretary issued a
 27 memorandum terminating the program. *Id.* Affected individuals and third parties

1 challenged the rescission, arguing, *inter alia*, that the termination violated the
2 Administrative Procedure Act (“APA”). *Regents*, 2020 WL 3271746, at *3.

3 Like here, in *Regents*, the government argued that the agency action at issue
4 fell “outside this Court’s jurisdiction.” *Id.* at 7. The Supreme Court rejected that
5 contention because § 702 of the APA’s “basic presumption of judicial review for one
6 suffering legal wrongs because of agency action” applied, and that the Court had
7 jurisdiction. *Id.* (internal citations and quotations omitted). The government has not
8 argued here, as it did in *Regents*, that the Treasury or IRS’s actions are “committed to
9 agency discretion by law,” thus falling under the rare exception to the broad grant of
10 judicial review over agency action. *Id.* Indeed, such an argument would fail here,
11 because the Exclusion Provision does not provide for agency discretion.

12 Where, as here, Plaintiffs raise a valid claim that arises under federal law, the
13 federal government is the defendant, and the suit does not seek money damages,
14 “jurisdiction is secure.” *Blagojevich v. Gates*, 519 F.3d 370, 371 (7th Cir. 2008). The
15 APA waives sovereign immunity for the kind of relief Plaintiffs seek, so long as the
16 federal statute at issue authorizes review of agency action. *Id.* at 372. The APA
17 provides an express waiver of sovereign immunity where, as here, the plaintiffs seek
18 equitable relief. 5 U.S.C. § 702. Section 702 provides in relevant part:

19 An action in a court of the United States seeking relief other than
20 money damages and stating a claim that an agency [. . .] acted or
21 failed to act [. . .] shall not be dismissed nor relief therein be denied on
22 the ground that it is against the United States or that the United States
is an indispensable party.

23 In *Blagojevich v. Gates*, the then-governor of Illinois sued the Secretary of
24 Defense under 28 U.S.C. §§ 1331 and 1346(a)(2). The District Court for the Central
25 District of Illinois dismissed the suit *sua sponte* because the government had not
26 waived sovereign immunity and thus, the court lacked jurisdiction. *Blagojevich*, 519
27

1 F.3d at 370. The Seventh Circuit Court of Appeals reversed and remanded the case,
2 holding § 702 of the APA is generally applicable, regardless of whether a claim is
3 “under the APA;” and § 702 governs when “*any* federal statute authorizes review of
4 agency action.” *Id.* at 372 (citing *Bowen v. Massachusetts*, 487 U.S. 879 (1988))
5 (emphasis in original). The Court of Appeals for the Ninth Circuit reached a similar
6 conclusion when, in *The Presbyterian Church (U.S.A.) v. United States*, the court
7 reversed and remanded a case to the District Court of Arizona. 870 F.2d 518 (9th Cir.
8 1989). The Ninth Circuit rejected an attempt by INS to limit § 702 to agency action,
9 holding, “nothing in the language of the [1976] amendment to [§ 702] suggest that
10 the waiver of sovereign immunity is limited to claim challenging conduct falling
11 within the narrow definition of ‘agency action.’” *Id.* at 525.

12 Provisions such as “5 U.S.C. § 701(a), and § 706(2)(A) allow[] a court to set
13 aside agency action that is ‘not in accordance with law,’” and that law is not limited
14 to “another portion of the APA.” *Id.* The Court of Appeals for the District of
15 Columbia has reached the same conclusion. In *Trudeau v. Federal Trade*
16 *Commission*, the Federal Trade Commission (“FTC”) sought to dismiss a lawsuit for
17 lack of jurisdiction, arguing that the court had no jurisdiction over the infomercial
18 producer plaintiff’s First Amendment claims against it. *Trudeau v. Federal Trade*
19 *Com’n*, 456 F.3d 178, 184-185 (D.C. Cir. 2006). The Court of Appeals held that
20 Section 1331 provided jurisdiction. *Id.* at 185. The APA’s “waiver of sovereign
21 immunity applies to any suit whether under the APA or not.” *Id.* at 186. *See also*
22 *Delano Farms Co. v. California Table Grape Com’n*, 655 F.3d 1337, 1334 (Fed. Cir.
23 2011) (“We hold that section 702 of the APA waives sovereign immunity for non-
24 monetary claims against federal agencies, subject to the limitations in subsections (1)
25 and (2). It is not limited to ‘agency action’ or ‘final agency action,’ as those terms are
26 defined in the APA.”); *Michigan v. United States Army Corps of Engineers*, 667 F.3d
27

1 765 (7th Cir. 2011) (sovereign immunity waived when “any federal statute authorizes
2 review of agency action, as well as in cases involving constitutional law.”).

3 Claims challenging Department of Treasury and Internal Revenue Service
4 action – such as distributing billions of dollars of Advance Payments to United States
5 persons but unconstitutionally excluding U.S. persons who are married to individuals
6 who do not have SSNs – have fared the same. For example, in *Freedom from*
7 *Religion Foundation, Inc. v. Schulman*, the District Court for the Western District of
8 Wisconsin held that the APA waived sovereign immunity when the Plaintiff
9 challenged IRS policy “pursuant to the Fifth Amendment’s equal-protection clause
10 and the Establishment Clause.” 961 F. Supp.2d 947, 954 (W.D. Wis. 2013). Despite
11 the lack of final agency action or action committed to agency discretion, the court
12 held “the second sentence of § 702 still waives the United States’s [*sic*] sovereign
13 immunity [...] because that sentence is not limited to claims brought under the APA
14 itself but **is generally applicable to any action for prospective relief, including an**
15 **action involving a constitutional challenge.”** *Id.* (emphasis added). Section 702
16 applies here because Defendants have issued Advance Payments to over one hundred
17 million Americans, but Plaintiffs are unconstitutionally ineligible.

18 **II. Plaintiffs’ Claims are not Barred by the Anti-Injunction Act or the** 19 **Declaratory Injunction Act**

20 *A. Refundable Tax Credits are Not Taxes, and Do Not Implicate the AIA or* 21 *the DJA.*

22 Defendants admit that the CARES Act creates a “refundable tax credit.” *See*
23 Dkt. 30 at 7. Because it created a refundable tax *credit* and not a *tax*, neither the Anti-
24 Injunction Act (“AIA”) nor the Declaratory Judgment Act (“DJA”) bar this Court’s
25 review of the claims. Both the AIA’s text and its prior conclusive judicial
26 interpretation make clear that Plaintiffs’ claims cannot be construed as an attempt to
27

1 “restrain[] the assessment and collection of any tax [...]” within the meaning of the
2 statute, thereby removing the essential predicate for applying the AIA.

3 The AIA does not bar this suit because Plaintiffs and the Putative Class do not
4 seek to restrain assessment or collection of any *tax*. The AIA provides:

5 Except as provided [...] no suit for the purpose of restraining the
6 assessment or collection of any tax shall be maintained in any court by
7 any person, whether or not such person is the person against whom
such tax was assessed.

8 I.R.C. § 7421(a). The CARES Act creates a refundable tax credit to be distributed as
9 an Advance Payment. Providing equal access to the Advance Payment to Plaintiffs
10 will not restrain assessment or collection of tax. I.R.C. § 6428(f)(3)(A). The DJA, 28
11 U.S.C. § 2201(a), which generally bars federal courts from granting declaratory
12 judgments “with respect to Federal taxes,” has been deemed to be “coterminous” with
13 the AIA. *Fla. Bankers Ass’n v. U.S. Dep’t of the Treasury*, 799 F.3d 1065, 1067
14 (D.C. Cir. 2015) (citing *Cohen v. United States*, 650 F.3d 717, 730-31 (D.C. Cir.
15 2011) (*en banc*)); see also *Bob Jones Univ. v. Simon*, 416 U.S. 725, 733 n.7 (1974).
16 Accordingly, neither the AIA nor the DJA inhibit this Court’s jurisdiction or the
17 APA’s waiver of sovereign immunity.

18 While the AIA denies a court’s jurisdiction from maintaining a “suit for the
19 purpose of restraining the assessment or collection of any *tax*,” I.R.C. § 7421
20 (emphasis added), Defendants concede that the Advance Payment is not a tax. The
21 Supreme Court emphasized the importance of the term “tax” in AIA’s text in
22 *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 543-46
23 (2012) (“*NFIB*”), when it considered whether the AIA precluded the Court from
24 reaching the merits of a constitutional challenge to the Affordable Care Act before
25 payment of the shared responsibility payment. The Court noted the “decision to label
26 this exaction a ‘penalty’ rather than a ‘tax’ is significant.” *NFIB*, 567 U.S. at 544.
27

1 The AIA applies only when the item at issue is an “exaction,” i.e., an amount
2 due the Government, when Congress chooses to call that exaction a “tax.” The D.C.
3 Circuit took that rationale to its logical conclusion in *Florida Bankers Association v.*
4 *U.S. Department of the Treasury*, 799 F.3d 1065, 1067 (D.C. Cir. 2015), declining to
5 reach the merits of a challenge to a regulation imposing reporting requirements on
6 banks, a “penalty” codified at 26 U.S.C. § 6721(a). Then-Judge Kavanaugh
7 explained, “any reference in this title to ‘tax’ imposed by this title shall be deemed
8 also to refer to the penalties and liabilities provided by this subchapter.” *Id.* at 1068.
9 He went on, “[i]f the penalty here were not itself a tax, the Anti-Injunction Act would
10 not bar this suit.” *Id.* at 1069.

11 Defendants compare the Earned Income Tax Credit (“EITC”) to the CARES
12 Act Advance Payment. *See* Dkt. 30 at 7. The EITC is a refundable tax credit intended
13 “to negate the disincentive to work caused by Social Security taxes.” *Sorenson v.*
14 *Sec’y of Treasury of U.S.*, 475 U.S. 851, 858 (1986). It is precisely for that reason –
15 that the EITC is a refundable tax credit **and not a tax** – that courts have
16 unequivocally held that the AIA and the DJA do not apply to bar class action lawsuits
17 based upon refundable tax credits. For example, in *Nelson v. Regan*, 731 F.2d 105 (2d
18 Cir. 1984), a certified class sought declaratory and injunctive relief where refundable
19 portions of the EITC were being intercepted pursuant to § 6402(c) of the I.R.C. to
20 satisfy past due child support obligations. On appeal, the Second Circuit held that
21 neither the AIA nor the DJA prevented a hearing on the merits, because “the tax
22 intercept program [seizing past due child support] does not apply to refunds or
23 payments of earned income credits.” *Id.* at 110-12.

24 A circuit split developed on the issue when the Ninth Circuit came out the
25 other way in *Sorenson v. Sec’y of Treasury of U.S.*, 752 F.2d 1433 (9th Cir. 1985),
26 holding that EITCs *were* subject to being intercepted under § 6402(c). The Ninth’s
27

1 Circuit’s holding was premised on the conclusion that the EITC was “*undisputedly*
2 *owed to petitioner* and undisputedly not owed to the United States **as taxes.**”
3 *Sorenson*, 752 F.2d at 1437 (emphasis added). Eventually, the Supreme Court
4 resolved that split by siding with the Ninth Circuit in *Sorenson v. Sec’y of Treasury of*
5 *U.S.*, 475 U.S. 851 (1986), holding that the EITC was subject to the past due child
6 support intercept program. Tellingly, the Government abandoned their jurisdictional
7 challenges under the AIA and the DJA before the Supreme Court.² Thus, every court
8 to hear a challenge to the propriety of including refundable EITCs in tax refunds
9 intercepted and directed toward back child-support obligations proceeded to the
10 merits thereof, notwithstanding the AIA or DJA.

11 Similarly, in *Church of Scientology of Celebrity Ctr., Los Angeles v. Egger*, the
12 District Court for the District of Columbia denied the Commissioner’s Motion to
13 Dismiss for lack of jurisdiction on a claim that the IRS consider and rule promptly on
14 applications for ministers to receive certain tax-exempt status. 539 F. Supp. 491, 494
15 (D.D.C. 1982). The court denied the IRS’s motion on the relevant count, because
16 neither the AIA nor the DJA bar actions “**where the litigation did not threaten to**
17 **deny anticipated tax revenue to the Government.**” *Id.* (internal citations and
18 quotations omitted, emphasis added). The Government anticipates no tax revenue
19 here. The AIA and DJA simply do not apply.³

20
21
22 ² In its brief to the Supreme Court, the government acknowledged that jurisdictional
23 contentions to district courts were “based chiefly on the Anti-Injunction Act, the tax
24 exception to the Declaratory Judgment Act, procedural limitations on refund suits,
25 and sovereign immunity To the extent the government renewed these arguments
26 on appeal, the Ninth Circuit likewise rejected them ..., and we have not sought
27 review of those questions here.” Brief for the Respondents, p. 4, fn. 1 (internal
28 citations omitted).

³ On May 4, 2020, the Supreme Court granted certiorari to *CIC Services, LLC v.*
Internal Revenue Service, Docket No. 19-930 (Sup. Ct. 2020) to resolve an apparent

1 *B. CARES Act Amendments to the Internal Revenue Code Expressly*
2 *Providing that the CARES Act Payments are Subject to Deficiency*
3 *Procedures Remove Any Doubt that the Credit is Not a Tax.*

4 Finally, Congress made additional amendments to the Internal Revenue Code
5 when establishing the Advance Payment that eliminate any possible argument that the
6 CARES Act Advance Payment is a tax that implicates the AIA or the DJA. Subtitle F
7 of the Internal Revenue Code provides for procedure and administration thereof.
8 Within Subtitle F, Chapter 63 provides for the Secretary's assessment authority
9 (§ 6201 *et seq.*) and deficiency procedures (§ 6211 *et seq.*). In general, when a
10 taxpayer disagrees about the amount of tax or additions to tax that are due, the IRS
11 will determine a deficiency and issue a Notice of Deficiency, affording the taxpayer a
12 right to contest the IRS's determination in United States Tax Court ("Tax Court"), a
13 pre-payment forum. I.R.C. §§ 6211, 6212. Or, if the IRS has determined that certain
14 "assessable penalties" apply, the IRS may assess the penalties and the taxpayer must
15 pay the disputed amount in full and file a claim for refund with the IRS and then in
16 either District Court or the Court of Federal Claims. I.R.C. §§ 6671, 7422. If a
17 taxpayer does not file a timely petition in Tax Court after receiving a Notice of
18 Deficiency, paying the disputed tax and filing a claim for refund is often the only
19 means to obtain judicial review. I.R.C. § 7422.

20 If the CARES Act created a tax, § 7422 would provide the proper avenue for
21 judicial review. However, in addition to creating the credit contained in § 6428, the
22 CARES Act also amended § 6211 of the Internal Revenue Code. The amendment to
23 § 6211 now provides that the CARES Act rebate is subject to deficiency procedures
24 and allows taxpayers to contest adverse determinations regarding CARES Act

25
26 Circuit Split between the Sixth, Seventh and Tenth Circuits on the question of
27 whether the Anti-Injunction Act bars challenges to unlawful regulatory mandates
28 issued by administrative agencies when those mandates are not taxes.

1 eligibility in Tax Court. This change to § 6211 creates administrative ease both for
2 the taxpayer and for the Internal Revenue Service. If the CARES Act credit was a tax
3 that triggered the AIA, Congress would not have needed to expressly provide that it is
4 subject to deficiency procedures in § 6211(b)(4)(A), because all *tax* is already subject
5 to deficiency procedures under § 6211(a). Giving meaning to every word in the
6 statutes Congress enacted requires the conclusion that the CARES Act created a tax
7 credit, not a tax, and a suit preventing Defendants from depriving Plaintiffs equal
8 access to that credit would not restrain assessment or collection of any tax. Instead,
9 the Advance Payment under § 6428 is a refundable credit—the inverse of an exaction
10 or a tax.

11 **III. *In the Alternative, Plaintiffs’ Case Does “Arise Under” the APA***

12 Agency action reviewable under § 704 of the APA, unlike § 702 of the APA,
13 must be “final” and there must be no other adequate remedy for judicial review. *U.S.*
14 *Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (“*U.S. Army*
15 *Corps*”). Section 702 of the APA creates a general waiver of the government’s
16 sovereign immunity, regardless of the cause of action. *See* Section I, *supra*. However,
17 even if that were not the case, despite what Defendants argue in pages 11 to 14 of the
18 MTD, Plaintiffs have stated a claim pursuant to the APA under § 704 as well as under
19 § 702. *U.S. Army Corps*, cited in Defendants’ MTD at 11, illustrates exactly why
20 Plaintiffs will prevail, even if they were required to establish that agency action is
21 final and that no other adequate review of agency action exists (which, as explained
22 above, they are not required to do).

23 *A. The Agency Action at Issue is Final.*

24 Agency action is “final” for purposes of § 704 of the APA if it “mark[s] the
25 consummation of the agency’s decisionmaking process,” and “the action must be one
26 by which rights or obligations have been determined, or from which legal
27

1 consequences will flow.” *U.S. Army Corps*, 136 S.Ct. at 1813. The Treasury
2 Department and IRS’s decisionmaking process here is complete as it relates to
3 Plaintiffs and the Putative Class. Advance Payments have been issued to over one
4 hundred million Americans (*see* Exhibit A) and will not be issued to Plaintiffs based
5 on their having filed taxes jointly with spouses who do not have an SSN. Defendants
6 do not argue otherwise, but instead argue that *Plaintiffs’* circumstances may change.
7 That may be true, but a change in circumstances would not render Plaintiffs eligible
8 for the Advance Payment. The agencies’ decisionmaking process here is in
9 accordance with the statute, which deprives Plaintiffs of equal treatment as compared
10 to their fellow Americans. Secondly, there can be no question that the Treasury
11 Department and IRS’s final agency decision, in issuing Advance Payments to other
12 eligible Americans but not Plaintiffs and the Putative Class, is an action that
13 determined rights or obligations. Defendants do not argue otherwise.

14 In *U.S. Army Corps*, the Supreme Court employed “the ‘pragmatic’ approach
15 we have long taken to finality.” *Id.* at 1814. When agency determination deprives a
16 party of a right or benefit others enjoy, it is final. *Id.* at 1815. Here, Defendants
17 determined that Plaintiffs and the Putative Class are not eligible to receive Advance
18 Payments, while they have deployed Advanced Payments to other eligible persons.
19 The agency action is final.

20 *B. No Adequate Alternatives for Challenging the Agency Action Exist.*

21 In *U.S. Army Corps.*, (cited in MTD at 11), the Supreme Court held that
22 “parties need not await enforcement proceedings before challenging final agency
23 action where such proceedings carry the risk of serious ‘civil and criminal
24 penalties.’” 136 S. Ct. at 1815. As Plaintiffs explained in detail in pages 14 to 15 of
25 the TRO Reply, such is the case here. If Plaintiffs are not provided with the Advance
26 Payment, to claim the credit, Plaintiffs must file a tax return after filing season opens
27

1 on or about February 1, 2021. Plaintiffs would either need to (A) file a tax return
2 claiming the credit and file a statement explaining they are not entitled to the credit
3 but are claiming it, and contesting the unconstitutional aspects of the law, or (B) file a
4 tax return that does not claim the credit, pay their taxes in full, and months later file
5 an amended return claiming the credit as a claim for refund following the procedures
6 in I.R.C. § 7422. No matter what avenue Plaintiffs choose, they will never receive the
7 emergency Advance Payment, which must be issued by December of 2020, and the
8 earliest potential judicial intervention is years away.

9 If Plaintiffs select option A, they open themselves up to potential civil and
10 criminal liability, *see*, I.R.C. §§ 6662, 7201, and must litigate the right to the credit in
11 United States Tax Court. I.R.C. § 6212. If Plaintiffs select option B, as suggested by
12 Defendants, they must wait until at least November 2021 before they can even file
13 suit. Refund claims the IRS deems false are subject to severe criminal and civil
14 penalties. *See, e.g.*, 18 U.S.C. § 287, Internal Revenue Manual 9.1.3.4.7.1 (05-15-
15 2008) (5) (“Application of 18 U.S.C. § 287 is particularly appropriate in instances
16 where a false claim for refund has been filed. *It is only necessary to prove the*
17 *defendant filed the claim for refund knowing that he/she was not entitled to receive*
18 *it.*” (emphasis added)). Moreover, the Supreme Court expressly rejected the notion
19 that long, arduous, and expensive litigation is an adequate alternative to an injunction
20 prohibiting agency action. *U.S. Army Corps*, 136 S.Ct. at 1815-1816.

21 **IV. Plaintiffs Have Standing and their Claims are Ripe for Judicial Review** 22 **Now**

23 Plaintiffs and the Putative Class have been denied a benefit that has already
24 been provided to over one hundred million other American citizens. *See* Exhibit A.
25 The only thing distinguishing Plaintiffs and the Putative Class from those eligible to
26 receive the Advance Payment is whom they married. *See* Dkt. 28 ¶ 58. American
27

1 citizens who are not married to non-SSN holders need not wait to file a 2020 tax
2 return in 2021 and file a claim for refund to receive the Advance Payment—it was
3 automatically issued to them. *See* IR 2020-61, March 30, 2020, attached hereto and
4 incorporated herein as Exhibit B. And if those American citizens who are not married
5 to individuals who lack an SSN end up earning too much money in 2020 to qualify
6 for the credit, it need not be repaid. I.R.C. § 6428(e).

7 Conversely, U.S. citizens who are married to individuals who do not have an
8 SSN and file jointly are not eligible to receive the Advance Payment. Absent this
9 Court’s intervention, they will never receive it, because it must be issued by
10 December 31, 2020 or not at all. An administrative claim for refund followed by
11 expensive refund litigation will thwart Congressional intent to prevent Plaintiffs’
12 suffering *right now*, including the risk of homelessness, starvation for them and their
13 families including young children, inability to seek medical treatment, and lack of
14 basic necessities such as food, medicine, and clothing. *See* Dkt. 28 ¶ 90. The IRS has
15 issued Advance Payments to 152,167,600 Americans, including almost 750,000
16 Americans residing outside of the United States, totaling over \$257,954,545,196.00.
17 *See* Exhibit A. A claim for refund will not address Plaintiffs’ deprivation of unequal
18 treatment, **right now**.

19 Defendants made the same two fatally flawed arguments here, that Plaintiffs
20 have not been denied an Advance Payment and that Plaintiffs may become eligible
21 for the Advance Payment, that Plaintiffs demonstrated to be absolutely meritless in
22 pages 10 to 15 of the TRO reply at Dkt. 26. Rather than repeat those arguments here,
23 Plaintiffs direct the Court to that document. Another case that illustrates the absolute
24 fallacy of Defendants’ arguments is *Freedom from Religion Foundation v. Shulman*,
25 961 F. Supp.2d 947 (W.D. Wis. 2013).

1 In *Freedom from Religion Foundation*, a tax-exempt organization filed a
2 lawsuit seeking declaratory and injunctive relief against the IRS, alleging that the IRS
3 employed disparate treatment when enforcing a policy requiring tax-exempt
4 organizations to refrain from participating in or intervening in political campaigns.
5 961 F. Supp.2d at 950. The IRS moved to dismiss, contending that the organization
6 lacked standing to sue and that the suit was barred by sovereign immunity. *Id.* The
7 District Court for the Western District of Wisconsin’s careful analysis of the standing
8 claim is particularly instructive here.

9 To prove that he has standing to seek injunctive relief, a plaintiff must
10 show that he is under threat of suffering “injury in fact” that is
11 concrete and particularized; the threat must be actual and imminent,
12 not conjectural or hypothetical; it must be fairly traceable to the
13 challenged action of the defendant; and it must be likely that a
14 favorable judicial decision will prevent or redress the injury.

15 *Freedom from Religion*, 961 F. Supp.2d at 950 (internal citations omitted). The
16 court found that each and every requirement was met. As is particularly relevant here,
17 “[i]f it is true that the IRS has a policy of not enforcing the prohibition on
18 campaigning against religious organizations, then the IRS is conferring a benefit on
19 religious organizations (the ability to participate in political campaigns) that it denies
20 [...] to the Foundation.” *Id.* at 951. “As a victim of the IRS’s alleged discrimination,
21 the Foundation has suffered injury in fact.” *Id.* (citing *Heckler v. Matthews*, 465 U.S.
22 728, 738-40 (1984)). Here, as in *Freedom from Religion*, the IRS confers a benefit in
23 the form of an Advance Payment (that does not have to be repaid even if eligibility is
24 later determined to be lacking) on U.S. Citizens other than Plaintiffs and the Putative
25 Class. Plaintiffs are now the victims of the Defendants’ discrimination, and they too
26 have suffered an injury in fact. And, just as in *Freedom from Religion*, “because the
27 [...] IRS’s policy is ongoing, the injury is more than actual and imminent,” and
28 Plaintiffs “are being deprived of equal treatment right now.” *Id.* The Treasury

1 Department and the Internal Revenue Service are the agencies responsible for making
2 the Advance Payment to Americans, other than Plaintiffs and the Putative Class. So
3 as in *Freedom from Religion*, the injury is fairly traceable to those agencies and
4 Defendants who are responsible for implementing this policy. *Id.* Finally, even
5 Defendants do not argue, nor could they, that an injunction prohibiting the IRS and
6 the Treasury Department from continuing the policy of discriminating against
7 Plaintiffs and the Putative Class would not prevent further injury. *Id.* Accordingly,
8 Plaintiffs have standing, and their injuries that are happening *right now* are ripe for
9 adjudication. *Id.* Defendants' misguided citation to *Thunder Basin Coal Company v.*
10 *Reich*, 510 U.S. 200 (1994) (MTD at 9-10) for the proposition that courts are
11 reluctant to find pre-enforcement challenges ripe has no bearing on the instant facts,
12 where a benefit has been conferred on hundreds of millions of Americans and
13 indisputably will not be conferred on Plaintiffs and the Putative Class. Simply put,
14 ***discrimination itself*** is a cognizable injury. *Id.* at 952.

15 **V. The FCA States a Claim for Relief**

16 In a misguided attempt to sway this Court in favor of its position on the merits,
17 Defendants ask this Court to dismiss the FAC because Acts of Congress are
18 presumed to be constitutional (MTD at 14); section 6248(g) does not violate due
19 process or equal protection principles (MTD at 15-18); section 6248(d) does not
20 make distinctions based on alienage (MTD at 18); even if it did such distinction
21 would only be subject to rational basis review (MTD at 20); and Plaintiffs have failed
22 to state a cognizable legal theory (MTD at 20). Setting aside the deeply troubling
23 inferences to be drawn from the United States government taking a position that
24 allegations of discrimination do not state a claim on which relief can be granted in
25 federal courts (MTD at 14-21), none of the arguments raised by Defendants establish
26 a lack of jurisdiction or the failure to state a claim, and they do not warrant dismissal,
27

1 much less require it.

2 The FAC alleges, *inter alia*, that Defendants violated Plaintiffs' right of
3 association, right to due process of law, right to equal protection under the law
4 secured by the First, Fifth and Fourteenth Amendments to the United States
5 Constitution, as well as the penumbra of privacy rights secured by the First, Third,
6 Fourth and Fifth Amendments. *See* Dkt. 28 ¶ 58. The FAC also alleges that Plaintiffs
7 are suffering and, absent this Court's immediate issuance of declaratory and
8 injunctive relief, will continue to suffer irreparable harm, including failure to meet
9 "basic necessities of life, including the ability to put food on the table, paying rent,
10 insurance, health insurance, and loss of privacy, reputation in the community, and
11 dignity." *See* Dkt. 28 ¶ 90. Notably, the ability to put food on the table, pay rent,
12 insurance, and health insurance are all recognized by the IRS as "expenses that are
13 necessary to provide for a taxpayer's (and his or her family's) health and welfare
14 and/or production of income." *Collection Financial Standards*, IRS.GOV (March 30,
15 2020), [https://www.irs.gov/businesses/small-businesses-self-employed/collection-](https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards)
16 [financial-standards](https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards) (last visited June 16, 2020). Defendants' contention that
17 Plaintiffs' allegations of Defendants depriving them of the ability to pay necessary
18 living expenses and loss of privacy, reputation in the community, and dignity due to
19 deprivation of constitutionally protected rights do not give rise to a cause of action is
20 patently absurd. Indeed, as the court in *Freedom from Religion* pointed out in
21 rejecting the IRS's contention that it would be "inappropriate for a court to issue an
22 injunction that results in judicial supervision of the IRS's enforcement of the tax
23 code," this "argument goes to the merits of the case" and does not impact standing or
24 stating a valid claim on which relief can be granted. 961 F. Supp.2d at 953.

25 Defendants' arguments and reliance on caselaw demonstrating the ubiquity of
26 discriminatory impacts resulting from a "scheme of taxation" are misplaced, and,
27

1 indeed, fail to demonstrate any failure on Plaintiffs' part to state a claim for relief.
2 Indeed, Plaintiffs have demonstrated (and Defendants cannot deny) that the Exclusion
3 Provision is discriminatory on its face. While certainly this Court must consider the
4 legislatures' "efforts to tackle problems," Defendants' own authority notes that this
5 exercise is to be conducted "within the limits of rationality." *See* Dkt. 30 at 15 (*citing*
6 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 41 (1973)). Even if this Court
7 were to decide that rational basis review applies to the circumstances here, such a
8 determination could not possibly result in a disposition at the pleading stage of the
9 litigation. Plaintiffs further direct the Court to pages 15 to 22 of the TRO Reply, in
10 which they addressed these same arguments previously advanced by Defendants.

11 *A. Section 6428(g) violates the First Amendment of the U.S. Constitution.*

12 The Exclusion Provision directly violates the First Amendment of the U.S.
13 Constitution. In *Griswold v. Connecticut*, the Court stressed the sanctity of marriage
14 lying within the zone of privacy created by several fundamental constitutional
15 guarantees. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). The Exclusion
16 Provision discriminates against Plaintiffs by invading the fundamental right to the
17 sanctity of marriage and as a result of the disparate treatment, Plaintiffs are denied an
18 Advance Payment.

19 The fundamental right of marriage evokes the freedoms of association
20 embodied in our First Amendment. U.S. Const. amend. I. *Roberts v. United States*
21 *Jaycees*, 468 U.S. 609, 619-20 (1984). Moreover, the Supreme Court has further
22 established a statute may be held constitutionally invalid as applied when it operates
23 to deprive an individual of a protected right although its general validity as a measure
24 enacted in the legitimate exercise of power is beyond question. *Boddie v.*
25 *Connecticut*, 401 U.S. 371, 379 (1971) ("[T]his Court has often held that a valid
26 statute was unconstitutionally applied in particular circumstances because it
27
28

1 interfered with an individual’s exercise of [First Amendment] Rights”). The First
2 Amendment requires the Right of Privacy and the fundamental right to marry to be
3 protected and the Exclusion Provision of the CARES Act violates it by intentionally
4 discriminating against Plaintiffs based on whom they chose to marry.

5 Defendants’ citations to support their argument that rational basis review
6 applies are not remotely analogous to the instant matter. *See* Dkt. 30 at 16-17. They
7 cite *In re Talmadge*, 832 F.2d 1120, 1125 (9th Cir. 1987) to support their conclusion
8 that the distinction between married and non-married persons in bankruptcy are
9 subject to rational basis review conveniently ignoring that a.) Plaintiffs, here, are
10 married; and b.) unlike bankruptcy, marriage is a fundamental right. *Id.* (*In re*
11 *Statham*, 483 F.2d 436, 437 (9th Cir. 1973) (*citing United States v. Kras*, 409 U.S.
12 434, 435 (1973)). *In re Talmadge*, 832 F.2d 1120, 1125 (9th Cir. 1987). Accordingly,
13 not only does *Talmadge* not apply, but any argument that rational basis review
14 applies fails as a matter of law.

15 *B. Section 6428(g) violates the Fifth Amendment of the U.S. Constitution.*

16 The Fifth Amendment provides that no person shall be “deprived of life, liberty
17 or property without due process of law.” U.S. Const. amend. V. The Supreme Court
18 has reiterated in numerous contexts that the right to marry is a fundamental right
19 under the Due Process Clause. *See, e.g., M. L. B. v. S. L. J.*, 519 U.S. 102, 116, 117
20 (1996); *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639-640 (1974); *Griswold*,
21 381 U.S. at 486; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942);
22 *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Discrimination based on the right to
23 marry is presumptively unconstitutional and subject to strict scrutiny. *Latta v. Otter*,
24 19 F. Supp. 3d 1054, 1066 (9th Cir. 2014) or *see, e.g., Sugarman v. Dougall*, 413 U.S.
25 634, 642 (1973). The Fifth Amendment protects freedom of personal choice in
26 matters of marriage and family.

1 The Exclusion Provision denies Plaintiffs a right afforded to all other United
2 States citizens who are *not* married to a spouse who lacks an SSN. It both impinges
3 on the fundamental right to marry in defining their families through personal choice
4 and is based upon an inherently invidious classification, subject to strict scrutiny.
5 *See, e.g., Sugarman*, 413 U.S. at 642.

6 The Exclusion Provision deprives Plaintiffs of the right to equal protection and
7 due process, which are “absolute” rights “in the sense that they do not depend upon
8 the merits of Plaintiff’s substantive assertions.” *Carey v. Phipus*, 435 U.S. 247, 266
9 (1978), (*citing Boddie v. Connecticut*, 401 U.S. 371, 375 (1971)); *Anti-Fascist*
10 *Committee v. McGrath*, 341 U.S., at 171-172 (Frankfurter, J., concurring)). The Fifth
11 Amendment provides that no person shall “be deprived of life, liberty, or property,
12 without due process of law.” USCS Const. amend. V. *See also Boddie v. Connecticut*,
13 401 U.S. 371, 375 (1971). Although the Fifth Amendment contains no Equal
14 Protection Clause as does the Fourteenth Amendment, the Fifth Amendment’s Due
15 Process Clause prohibits the Federal Government from engaging in discrimination
16 that is “so unjustifiable as to be violative of due process.” *Schlesinger v. Ballard*, 419
17 U.S. 498, 500 n.3 (1975), *quoting Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). *See*
18 *also, Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

19 Arguing that § 6428(g)(1) does not impact the fundamental right to marriage
20 does not make it so. *See* Dkt. 30 at 17. The Exclusion Provision *does*
21 disproportionately and negatively impact a taxpayer who chooses to marry someone
22 who does not have an SSN. In *United States v. Windsor*, the Supreme Court held that
23 the Defense of Marriage Act (“DOMA”), which denied same sex couples the right to
24 marry, “violated the basic due process and equal protection principles applicable to
25 the Federal Government” under the Fifth Amendment. 570 U.S. 744, 769-70 (2013).
26 In that case, as here, the plaintiff was already married to her chosen partner and was
27

1 denied a tax benefit because she was in a marriage that was valid under state law, but
2 the federal government discriminated against. The Supreme Court found standing and
3 jurisdiction. *Id.* The right to marry confers “a dignity and status of immense import.”
4 *Id.* at 768. Marriage is “more than a routine classification for purposes of certain
5 statutory benefits [and is] subject to constitutional guarantees.” *Id.* The Court held
6 that DOMA’s “principle effect is to identify a subset of state-sanctioned marriages
7 and make them unequal. The principal purpose is not to impose inequality[.]” *Id.* at
8 772. Similarly, the Exclusion Provision makes a subset of state-sanctioned marriages
9 unequal by – as in *Windsor* – “den[ying] or reduces benefits allowed to families.” *Id.*
10 at 773. This Court can only conclude that while “Congress has great authority to
11 design laws to fit its own conception of sound national policy, it cannot deny the
12 liberty protected by [...] Fifth Amendment.” *Id.* at 774.

13 C. *Section 6428(g) violates the Fourteenth Amendment of the U.S.*
14 *Constitution.*

15 Plaintiffs’ alienage challenge to the Exclusion Provision, as it relates to
16 Plaintiffs’ spouses’ immigration status, appears to be a case of the first impression.
17 See BLACK’S LAW DICTIONARY (10th ed. 2014); see also *Quisenberry v.*
18 *Compass Vision, Inc.*, 618 F. Supp. 2d 1223, 1228 (S.D. Cal. 2007) (finding
19 the case to be one of first impression in the jurisdiction where no California court had
20 previously addressed the issue); *In re First Alliance*, 2003 U.S. Dist. LEXIS 25925,
21 2003 WL 21530096, at *10 (finding a case of first impression where “there is no
22 legal precedent by which [Defendant] could have expected liability from
23 Plaintiffs[.]”). *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. CV13-5693 PSG
24 (GJSx), 2016 U.S. Dist. LEXIS 185233, at *5 (C.D. Cal. Sep. 8, 2016).

25 The Fourteenth Amendment states that no state shall “deny to any person
26 within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.
27 In addition, the Privileges and Immunities Clause of the Fourteenth Amendment

1 states that “the citizens of each state shall be entitled to all privileges and immunities
2 of citizens in the several states.” U.S. Const. amend. XIV, § 1, cl. 2. Though the
3 Fourteenth Amendment applies to the States, it has been construed to apply to the
4 Federal Government through the Reverse Incorporation Doctrine via *Bolling v.*
5 *Sharpe*, 347 U.S. 497 (1954) and its progeny. *See Brown v. Board of Education of*
6 *Topeka*, 347 U.S. 483 (1954); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200
7 (1995) (applying strict scrutiny to federal government on equal protection grounds).

8 Equal Protection and Due Process are implicated when laws discriminate
9 against people for: whom they marry; alienage; poverty; and class. *Boddie v.*
10 *Connecticut*, 401 U.S. 371, 385 (1971), *citing Takahashi v. Fish & Game Com.*, 334
11 U.S. 410 (1948), *Griffin v. Illinois*, 351 U.S. 12 (1956), *Skinner v. Oklahoma*, 316
12 U.S. 535 (1942). Indeed, the right to equal treatment guaranteed by the Constitution
13 is paramount. “[Classifications] based on alienage, like those based on nationality or
14 race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are
15 a prime example of a ‘discrete and insular’ minority [. . .] for whom such heightened
16 judicial solicitude is appropriate.” *Graham v. Richardson*, 403 U.S. 365, 372 (1971)
17 (footnotes and citations omitted).

18 Defendants’ reliance on alienage cases in its MTD is misplaced. *See* Dkt. 30 at
19 19. Defendants cite to *Alcaraz v. Block*, 746 F.2d. 593 (9th Cir. 1984) to argue that
20 the Ninth Circuit has previously upheld a federal program in the face of an equal
21 protection challenge. *See* Dkt. 30 at 19. Defendants fail to acknowledge that not only
22 was the challenged statute neutral on its face (not the case here), but also, the
23 challengers were **not U.S. citizens**. Here, the U.S. citizen and child(ren) are being
24 discriminated against based on the immigration status of their spouse/parent.
25 Plaintiffs further direct the Court to pages 14 to 18 of the Em. Mot., in which they
26 similarly addressed the scrutiny required. Accordingly, such a suspect classification is
27

1 subject to elevated scrutiny and could not withstand even a rational basis review.

2 Dismissal of Plaintiffs' claims would give rise to a dangerous precedent: that in
3 times of national or global emergency, the government may elect to deny life-saving
4 relief to U.S. citizens as a direct consequence of whom they chose to marry and in
5 violation of those Constitutional protections afforded to all. Plaintiffs implore this
6 Honorable Court to ensure the protection of their most basic freedoms and to preserve
7 and defend our Constitution as Defendants have failed to do here. The Exclusion
8 Provision cannot stand.

9 **CONCLUSION**

10 WHEREFORE, for the reasons stated herein above, Plaintiffs, individually and
11 on behalf of others similarly situated, respectfully request that this Court enter an
12 order denying Defendants' Motion to Dismiss in its entirety or, *in the alternative*,
13 granting Plaintiffs leave to amend their First Amended Complaint, and for any and all
14 such other relief as this Court deems necessary and proper.

15
16 DATED: June 22, 2020

Respectfully submitted,

17 JANE DOE and JOHN DOE, individually and
18 on behalf of others similarly situated.

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** Application for admission *pro hac vice*
pending
*Application for admission *pro hac vice*
forthcoming



Treasury, IRS release latest state-by-state Economic Impact Payment figures

IR-2020-101, May 22, 2020

WASHINGTON –The Treasury Department and the Internal Revenue Service today released updated state-by-state figures for Economic Impact Payments reflecting the opening weeks of the program.

“Economic Impact Payments have continued going out at a rapid rate to Americans across the country,” said IRS Commissioner Chuck Rettig. “We remind people to visit IRS.gov for the latest information, including answers to the most common questions we see surrounding the payments. We also continue to urge those who don’t normally have a filing requirement, including those with little or no income, that they can quickly register for the payments on IRS.gov.”

Millions of people who do not typically file a tax return are eligible to receive these payments. Payments are automatic for people who filed a tax return in 2018 or 2019, receive Social Security retirement, survivor or disability benefits (SSDI), Railroad Retirement benefits, as well as Supplemental Security Income (SSI) and Veterans Affairs beneficiaries who didn’t file a tax return in the last two years.

For those who don’t receive federal benefits and didn’t have a filing obligation in 2018 or 2019, the IRS continues to encourage them to visit the Non-Filer tool at IRS.gov so they can quickly register for Economic Impact Payments. People can continue to receive their payment throughout the year.

Economic Impact Payments, totals by State.			
State	State postal code	Total Number of EIP Payments	Total Amount of EIP Payments
Alabama	AL	2,332,771	\$ 3,988,469,624
Alaska	AK	333,429	\$ 580,774,111
Arizona	AZ	3,242,043	\$ 5,573,167,261
Arkansas	AR	1,428,624	\$ 2,496,524,966
California	CA	16,869,636	\$ 27,897,283,972
Colorado	CO	2,605,089	\$ 4,407,408,401
Connecticut	CT	1,601,397	\$ 2,609,644,445
Delaware	DE	463,653	\$ 778,262,906
District of Columbia	DC	308,306	\$ 421,734,460
Florida	FL	10,618,792	\$ 17,546,164,251
Georgia	GA	4,763,109	\$ 8,081,253,826
Hawaii	HI	691,424	\$ 1,179,264,436
Iowa	IA	1,477,214	\$ 2,660,402,672
Idaho	ID	808,118	\$ 1,512,453,150



News Release

Illinois	IL	5,729,351	\$ 9,630,495,809
Indiana	IN	3,174,698	\$ 5,613,824,661
Kansas	KS	1,310,151	\$ 2,359,448,490
Kentucky	KY	2,199,370	\$ 3,824,826,391
Louisiana	LA	2,186,332	\$ 3,680,836,165
Maine	ME	714,941	\$ 1,215,239,330
Maryland	MD	2,692,062	\$ 4,380,831,484
Massachusetts	MA	3,136,787	\$ 5,028,963,151
Michigan	MI	4,813,156	\$ 8,286,614,929
Minnesota	MN	2,613,771	\$ 4,577,086,990
Mississippi	MS	1,427,440	\$ 2,422,655,854
Missouri	MO	2,933,973	\$ 5,118,911,639
Montana	MT	527,902	\$ 932,003,084
Nebraska	NE	887,877	\$ 1,611,581,538
Nevada	NV	1,496,510	\$ 2,484,078,422
New Hampshire	NH	676,004	\$ 1,139,776,925
New Jersey	NJ	3,955,396	\$ 6,507,621,505
New Mexico	NM	997,072	\$ 1,684,917,178
New York	NY	9,341,632	\$ 15,034,060,259
North Carolina	NC	4,820,974	\$ 8,264,415,092
North Dakota	ND	354,768	\$ 632,983,746
Ohio	OH	5,828,477	\$ 9,833,041,489
Oklahoma	OK	1,799,803	\$ 3,190,860,867
Oregon	OR	2,031,861	\$ 3,425,278,483
Pennsylvania	PA	6,258,107	\$ 10,596,406,088
Rhode Island	RI	536,218	\$ 869,615,684
South Carolina	SC	2,443,864	\$ 4,174,979,940
South Dakota	SD	416,962	\$ 759,483,658
Tennessee	TN	3,305,606	\$ 5,693,071,645
Texas	TX	12,396,590	\$ 21,635,810,592
Utah	UT	1,287,162	\$ 2,494,199,291
Vermont	VT	327,867	\$ 555,841,287
Virginia	VA	3,796,975	\$ 6,447,589,217
Washington	WA	3,453,810	\$ 5,876,091,642
West Virginia	WV	913,264	\$ 1,578,210,674
Wisconsin	WI	2,817,912	\$ 4,948,382,340
Wyoming	WY	270,626	\$ 488,905,666
Foreign Addresses		748,724	\$ 1,222,795,510



News Release

Internal Revenue Service
Media Relations Office
Washington, D.C.

Media Contact: 202.317.4000
Public Contact: 800.829.1040
www.irs.gov/newsroom

Economic Impact Payment help available on IRS.gov

IRS.gov has a variety of [tools](#) and resources available to help individuals and businesses navigate Economic Impact Payments and get the information they need about EIP and other CARES Act provisions.

Economic Impact Payment FAQs: The IRS is seeing a variety of questions about Economic Impact Payments, ranging from eligibility to timing. These [FAQs](#) provide an overview and are updated frequently. Taxpayers should check the FAQs often for the latest additions; many common questions are answered on IRS.gov already, and more are being developed.



Economic impact payments: What you need to know

Updated with new information for seniors, retirees on April 1, 2020. Also see [Treasury news release](#).

Check IRS.gov for the latest information: No action needed by most people at this time

IR-2020-61, March 30, 2020

WASHINGTON — The Treasury Department and the Internal Revenue Service today announced that distribution of economic impact payments will begin in the next three weeks and will be distributed automatically, with no action required for most people. However, some taxpayers who typically do not file returns will need to submit a simple tax return to receive the economic impact payment.

Who is eligible for the economic impact payment?

Tax filers with adjusted gross income up to \$75,000 for individuals and up to \$150,000 for married couples filing joint returns will receive the full payment. For filers with income above those amounts, the payment amount is reduced by \$5 for each \$100 above the \$75,000/\$150,000 thresholds. Single filers with income exceeding \$99,000 and \$198,000 for joint filers with no children are not eligible. Social Security recipients and railroad retirees who are otherwise not required to file a tax return are also eligible and will not be required to file a return.

Eligible taxpayers who filed tax returns for either 2019 or 2018 will automatically receive an economic impact payment of up to \$1,200 for individuals or \$2,400 for married couples and up to \$500 for each qualifying child.

How will the IRS know where to send my payment?

The vast majority of people do not need to take any action. The IRS will calculate and automatically send the economic impact payment to those eligible.

For people who have already filed their 2019 tax returns, the IRS will use this information to calculate the payment amount. For those who have not yet filed their return for 2019, the IRS will use information from their 2018 tax filing to calculate the payment. The economic impact payment will be deposited directly into the same banking account reflected on the return filed.

The IRS does not have my direct deposit information. What can I do?

In the coming weeks, Treasury plans to develop a web-based portal for individuals to provide their banking information to the IRS online, so that individuals can receive payments immediately as opposed to checks in the mail.

I am not typically required to file a tax return. Can I still receive my payment?

Yes. The IRS will use the information on the Form SSA-1099 or Form RRB-1099 to generate Economic Impact Payments to recipients of benefits reflected in the Form SSA-1099 or Form RRB-1099 who are not required to file a tax return and did not file a return for 2018 or 2019. This includes senior citizens, Social Security recipients and railroad retirees who are not otherwise required to file a tax return.

Since the IRS would not have information regarding any dependents for these people, each person would receive \$1,200 per person, without the additional amount for any dependents at this time.

I have a tax filing obligation but have not filed my tax return for 2018 or 2019. Can I still receive an economic impact payment?

Yes. The IRS urges anyone with a tax filing obligation who has not yet filed a tax return for 2018 or 2019 to file as soon as they can to receive an economic impact payment. Taxpayers should include direct deposit banking information on the return.

I need to file a tax return. How long are the economic impact payments available?

For those concerned about visiting a tax professional or local community organization in person to get help with a tax return, these economic impact payments will be available throughout the rest of 2020.

Where can I get more information?

The IRS will post all key information on [IRS.gov/coronavirus](https://www.irs.gov/coronavirus) as soon as it becomes available.

The IRS has a reduced staff in many of its offices but remains committed to helping eligible individuals receive their payments expeditiously. Check for updated information on [IRS.gov/coronavirus](https://www.irs.gov/coronavirus) rather than calling IRS assistors who are helping process 2019 returns.